does not indicate a difference in the principles applied by the different courts, however, because the decisions invariably turn on the provisions of the local statute, and courts in the same state change their decisions as the local law changes.[31] There seems to be no question that the state of the cestui's domicile has jurisdiction and may tax him on the stock held in trust if it sees fit. This is in accord with the general rule in regard to such property. The cestui is the beneficial owner, he has a property interest which to all practical effects is the stock itself, that property interest is located where he is, and that is what gives jurisdiction to tax. At the same time the trustee being legal owner may be taxed at his domicile on the same stock.

The principal case declares that to tax the stock both in Illinois and California would be double taxation. This can have no weight whatever in determining jurisdiction to tax. Double taxation does not legally exist unless in the same jurisdiction. If a state has the power to tax, that power is in no way affected by the fact that some other state may tax the property. It may however affect the interpretation of the local law and it is only equitable that two states should not tax the same property unless their statutes require it.

It is difficult to ascertain from the decision in the principal case whether it is based on an interpretation of California law on this subject, or whether it lays down the broad principle that a cestui resident in this state cannot be taxed here for stock held by a non-resident trustee. If it turns on the former it may doubtless be justified, but if it denies the power of the state to tax the cestui for such stock it is out of harmony with the general rules of law in this country.

P. S. M.

CONSTITUTIONAL LAW: EFFECT OF CONTRACTS FIXING RATES ON STATE'S POWER TO DEFINE AND REGULATE PUBLIC UTILITIES: WATER CONTRACTS.—The peculiar doctrine of the California Supreme Court to the effect that no business can become a public calling until the owner makes a "dedication"[1] of his business to the public would, it seems, assume that the owner could make the so-called "dedication" whenever he desires. However, in the case of *Allen v. Railroad Commissioners*,[2] while conceding that the owner "did all that lay in his power to declare the company to be a public service corporation", the court held that it was impossible for him to make a "dedication" because he had sold

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[31] Dorr v. Boston (1856), 6 Gray 131, cestui held not taxable under statute then in force. Commented on in Bemis v. Boston (1866), 14 Allen 366, as being no longer the law and overruled in Hunt v. Perry, supra, n. 29.

[1] See note on this phase of the law on another page of this Review.
[2] (Oct. 1, 1918) 56 Cal. Dec. 356.

water certificates and contracted to sell water to certain consumers at a given price; that these agreements were property rights in the hands of the consumers which would be taken in violation of the fourteenth amendment if the company were permitted to make the desired "dedication". This was a case involving contracts between an irrigation company and its consumers which, as will be pointed out later, may have influenced the court to treat it as peculiar, yet the broad proposition of whether a state's power to regulate public utilities is abridged by the making of contracts fixing rates and conditions of service before the state actually undertakes to fix rates is surely presented. Is it possible that the exercise of the police power of the state, under which it defines and regulates public utilities, may be anticipated and made powerless by the device of making contracts?

There are some points in this connection that are well settled. To begin with, if the business in question was at the time of making the contract of the kind conceded to be a public utility by virtue of a statute then in existence, there is no doubt but that all authorities would agree that the making of the contract could not retrench the state's power of regulation,[3] for the power of the state to regulate prices and services then becomes an implied part of every contract, although the state may not actually have fixed a rate. The California court accepts this principle which accords with the Civil Code.[4] A more doubtful case is presented, however, where long period contracts have been entered into before the passage of a public utilities law. In such situations also the great majority of the commissions and courts uphold regulations and rates at variance with the established agreement,[5] particularly where there is a constitutional

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[3] Note, 32 Harvard Law Review, 74, Nov., 1918; Kansas City Bolt and Nut Co. v. Kansas City Light & Power Co. (Mo., 1918), 204 S. W. 1074; State ex. rel. City of Sedalia v. Pub. Ser. Com. of Mo. (Mo., 1918), 204 S. W. 497; McCook Irr. etc. Co. v. Burtless (1915), 99 Nebr. 250, 152 N. W. 334; Salt Lake City v. Utah Light & Traction Co. (1918), Utah, 173 Pac. 556, P. U. R. 1918 F, 377; Farmers & Merchants Telephone Co. v. Boswell Telephone Co. (1918), 119 N. E. 513, P. U. R. 1918 E, 172, 179 (Ind.); Collingswood Sewerage Co. v. Borough of Collingswood (1918), 102 Atl. 901 (N. J.); Hite v. Cincinnati I. & W. R. Co. (1918), 283 Ill. 297, 119 N. E. 904.

[4] Pinney & Boyle v. Los Angeles Gas & Electric Co. (1914), 168 Cal. 12, 141 Pac. 620, L. R. A. 1915 C, 282, Ann. Cas. 1915 D, 471. The court there said, ". . . . it will be conclusively presumed that the parties contracted in contemplation of the power of the proper board or tribunal to fix rates in every case where such power exists and may have been thereafter legally exercised."

§ 3513, Cal. Civ. Code, reads: "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

[5] Raymond Lumber Co. v. Raymond Light & Water Co. (1916), 92 Wash. 330, 159 Pac. 133, P. U. R. 1916 F, 437; Minneapolis St. P. & A. A. Ry. v. Menasha Wooden Ware Co. (1914), 159 Wis. 130, 150 N.

provision.[6] California, too, would find no trouble were it not for the untenable "dedication" doctrine, for the California court will not uphold such a contract if made with a company recognized by the court as a public utility at the time of contracting,[7] but the court insists on the "dedication" test.[8] Some jurisdictions appear to regard it as wholly immaterial whether any action had been taken by the state through constitutional amendments, statutes or decisions to define or regulate public utilities before the making of the contracts, for the right to regulate enterprises now known as utilities, "was inherently vested in all the people in common, prior to the time when men found it necessary to make use of their faculties in federating for their common good, and prescribing, through legislative bodies, among other things, the great legal system incidental to public callings and their regulation." Although the people failed fully to appreciate these rights, ". . . . they existed and were vested in all the people prior to the alleged creation of the so-called vested rights of individuals arising by reason of contractual relations." The legislature in passing laws regulating public utilities merely defines and regulates the application of this inherent power.[9] It is clear also that the power by which public utilities are defined and regulated does not in the opinion of the United States Supreme Court have its root in constitutional provisions and statutes, but is an inherent power which existed at common law and which the legislature must apply for the public welfare as required.[10]

In discussing the question of whether the contract rate is subject to alteration under laws subsequently passed, however,

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W. 411, 413 (contract made in 1898 held subject to law of 1913) affirmed by U. S. Supreme Court without opinion (1917), 38 Sup. Ct. Rep. 133, 62 L. Ed. 161; Yeatman v. Towers (1915), 126 Md. 513, 95 Atl. 158, P. U. R. 1915 E, 811; City of Woodburn v. Public Ser. Com. of Ore. (1916), 82 Ore. 114, 161 Pac. 391; Windfield v. Public Ser. Com. of Ind. (1918), 118 N. E. 531 (Ind.); Marquis v. Polk County Telephone Co. (1916), 158 N. W. 927 (Nebr.).

[6] City of Pocatello v. Murray (1912), 21 Ida. 180, 120 Pac. 812; Sandpoint Water & L. Co. v. Sandpoint (1918), 173 Pac. 972, P. U. R. 1918 F, 737 (Ida.).

[7] Pinney & Boyle Case, supra, n. 4.

[8] Supra, n. 1.

[9] Re Public Service Electric Co. (1918), N. J. Public Service Com., P. U. R. 1918 E, 898, 901. Same general view may be gathered from Sandpoint W. & L. Co. v. Sandpoint, supra, n. 6; Atl. Coast Elec. Ry. Co. v. Board P. U. Comm. (1918), 104 Atl. 218 (N. J.); Grand Trunk Western Ry. v. City of South Bend (1910), 174 Ind. 203, 36 L. R. A. (N. S.) 850, 89 N. E. 885, 91 N. E. 809; State ex rel. City of Sedalia v. Public Ser. Com. of Mo. (Mo., 1918), 204 S. W. 497.

[10] See Munn v. Illinois (1876), 94 U. S. 113; Atlantic Coast Line R. R. Co. v. City of Goldsboro (1914), 232 U. S. 548, 34 Sup. Ct. Rep. 364, 58 L. Ed. 721.

there is a tendency among writers to speak conservatively;[11] on the other hand authorities upholding the view that the contract rate prevails are in a small and dwindling minority.[12] The tendency now becoming evident may even go so far as to hold contracts for service invalid ab initio upon the passage of regulatory acts.[13]

Upon principle there can, it seems, be no question but that the police power cannot be abridged, and when courts talk of contracts being impaired or property rights being destroyed by state regulation they are assuming the very point in issue, viz.: whether contracts absolutely binding in their provisions and rights of property unconditionally vested can attach to businesses which the state through its police power may, as a matter of policy, decide to regulate. Really the only consistent view seems to be that they cannot, for "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter."[14] But California's doctrine of "dedication" assumes the question, and it is no answer to say that the court does recognize the binding effect of the police power when it recognizes the business in question as public, for it is no more within the power of the court to decide whether a business is public or not, after it has been so declared by statute, than it is for the court to disregard the police power in regulating rates of corporations and persons concededly doing a public business.[15]

In general there have been no exceptions made to the fundamental principles stated because the contracts were for the distribution of water[16] even where furnished for irrigation purposes with land sold at the same time the contracts were made. As the court in a leading case remarks, ". . . . the larger and

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[11] Wiel, "Water Rights in the Western States" (3d ed.) says: "The matter has usually been treated as an open question, though it may possibly be that the public rate displaces previous contract rates, as well as later ones."

[12] Belfast v. Belfast Water Co. (1916), 115 Me. 234, L. R. A. 1917 B, 908, 98 Atl. 738, P. U. R. 1917 A, 313, held that utilities act could have only prospective effect and not touch existing contracts. This case, however, is criticized as being opposed to the great weight of authority (L. R. A. 1917 B, 908, n.)

The Ohio Pub. Ser. Com. may also be in harmony with the minority view, Re Mahoning etc. Co. (1918), P. U. R. 1918 B, 69.

Some dissenting judges of course express themselves to the effect "that the doctrine that contractual property rights, which are subject to the state's police and taxing powers . . . . are, because of this, not protected from confiscation, is both novel and unsound."

[13] See note, 32 Harvard Law Review, 74, Nov., 1918.

[14] Hudson C. W. Co. v. McCarter (1908), 209 U. S. 349, 357, 28 Sup. Ct. Rep. 529, 531, 52 L. Ed. 828, 14 Ann. Cas. 560; Union Dry Goods Co. v. Georgia Public Service Co. (1914), 142 Ga. 841, 83 S. E. 946.

[15] Supra, n. 1.

[16] Yeatman v. Towers, supra, n. 5.

broader view, that most consistent with which the law of irrigation should be administered, and that to which courts are more and more tending, is that any contracts entered into between the irrigation company and consumers under the ditch . . . . were subject to legislative control."[17]

Water law in the western states has had a peculiar history, however. This has been particularly so in California, where the statutes and decisions have been conflicting and inconsistent. From 1850 to 1885 the statutes showed a marked tendency in favor of strict public regulation, but a period followed during which contract rights were emphasized. However, in 1911 the legislature began to return to the practice of public regulation and has proceeded in that direction since.[18] Nor were the early decisions entirely consistent. Fresno Canal Co. v. Park[19] upheld the right of contract, while Crow v. San Joaquin Co.[20] in the same year declared for the public rate. Stanislaus Co. v. Bachman[21] followed the Park case and gave the contract doctrine a strong footing, until Leavitt v. Lassen[22] really established the validity of the public rate, though attempting to harmonize the previous inconsistencies. Such was the law when the instant case was decided, which followed the Stanislaus case in principle, although citing the case of Leavitt v. Lassen, in support of some of its distinctions.

How such inconsistencies have been possible since the constitutional amendment of 1879, it is hard to understand. The people then declared that "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner to be prescribed by law."[23] All contracts for the use of water since 1879 have by implication embodied this provision. The court seems, however, to have drawn no distinctions between contracts made prior to 1879 and those made after. Other western states with similar constitutional provision have given them proper weight, however, and all contracts are held to embody them.[24]

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[17] McCook Irr. etc. Co. v. Burtless, supra, n. 3.

[18] See Wiel, "Water Rights in Western States" (3d ed.) § 1315, pp. 1212 et seq.

Also "The Relation Existing between Irrigation Water Users and Distributing Companies with Special Reference to Rights Arising out of Contract", a thesis submitted for degree of Juris Doctor, University of California, 1916, by Kenneth L. Blanchard. This is a splendid summary of California law.

[19] (1900) 129 Cal. 437, 62 Pac. 87.

[20] (1900) 130 Cal. 309, 62 Pac. 562.

[21] (1908) 152 Cal. 716, 93 Pac. 858.

[22] (1909) 157 Cal. 82, 106 Pac. 404.

[23] Art. 14, § 1.

[24] Supra, n. 6; Northern Colo. Irr. Co. v. Pouppirt (1910), 47 Colo. 490, 108 Pac. 23; Gould v. Maricopa Canal Co. (1904), 8 Ariz. 429, 76 Pac. 598.

The court in the principal case goes to the extent of finding something more than a contract right; it finds a vested property interest in the form of a water right. From the standpoint of rate regulation however, the question of the ownership of water rights becomes merely a question of reasonableness of rates,[25] and from the point of view of public regulation does not raise any great difficulty until the questions of priorities, extension of service, etc., are reached.[26] Public regulation may be limited to rate regulation, too, and not touch the question of compulsory service[27] notwithstanding the fact that the California court states unequivocally that the only distinction between private and public business centers about the question of compulsory service.[28] Again, the question is one of property rather than of use and use is the important consideration in public utility regulation. In fact the question of water rights should not have been raised in this case.[29] There is an objection to private water rights held by consumers, however, because of the limitation on use. Such rights, therefore, may be as impossible as contract rights, and should be under the California Constitution. Reduced to its final analysis, therefore, the question of water rights begs the whole question (unless the theory of public ownership outlined in the leading text[30] on water law be accepted) for if the law is such that contract rights cannot be established how can the stronger interest of water rights grow up to defeat the police power? This case really leaves the rule of Leavitt v. Lassen and re-establishes the discarded doctrine of Stanislaus v. Bachman.

Viewed then as a contract the right of the consumers upheld by the court in the principal case is opposed to practically all modern authority; it tends to defeat the extension of the doctrine of public callings by making legislation and "dedication" ineffective; and, worst of all, goes the length of holding that an inherent power (the police power) may be defeated by merely making a contract.[31] Looked upon as a water right the question of the right to regulate rates does not necessarily arise, for the question is one of property and not of use. However, difficult problems

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[25] San J. and Kings River Canal and Irr. Co. v. Stanislaus Co. (1914), 233 U. S. 454, 34 Sup. Ct. Rep. 652, 58 L. Ed. 1041.

[26] "Water Titles of Corporations and Their Consumers", Samuel C. Wiel, 2 California Law Review, 273.

[27] German Alliance Ins. Co. v. Lewis (1914), 233 U. S. 389, 34 Sup. Ct. Rep. 612, 58 L. Ed. 1011, L. R. A. 1915 C, 1189.

[28] See principal case.

[29] See Re Lake Hemet Water Co. (1916), 11 Cal. Rd. Com. 617. For objections to consumers water right see article by Samuel C. Wiel, supra, n. 26.

[30] Wiel, "Water Rights in Western States" (3d ed.)

[31] If the making of contracts limited the state's power to regulate, the police power would be subordinate to the right of individuals to contract. Portland R. Light & Power Co. v. R. R. Com. (1909), 56 Ore. 468, 105 Pac. 709, 109 Pac. 273.

in priority and beneficial use arise. Fundamentally, though, the holding is more radical than the contract theory, for it tends to prevent to even a greater extent the operation of the inherent power of government to regulate for the public welfare.

D. J. W.

CONSTITUTIONAL LAW: PUBLIC AND PRIVATE BUSINESS: RIGHT OF STATE LEGISLATURE TO DECLARE ANY BUSINESS PUBLIC.—Public service legislation[1] is forcing to a definite issue before the courts the question of how far a state legislature may go in declaring a business to be a public service or utility. Constitutional amendments, some of which, as in California,[2] confer upon the law-making body plenary power to define public utilities, have been followed by the passage of public utilities acts including new business in the category of public callings, and the interests affected having no recourse under the state constitutions, have resorted to the federal constitution[3] in an effort to defeat the new acts. Such was the situation when the California legislature included under the definition of public utilities all corporations and persons supplying water to others.[4] The California Supreme Court was called upon to interpret this provision in the case of *Allen v. Railroad Commissioners of California*,[5] which arose before the Railroad Commission when a company supplying water on an enormous scale under contracts applied to have its rates regulated. The consumers objected that to grant the petition would impair their contract rights. The court agreed with this view and practically annulled the statute by holding that "Our Constitution and our statutory definitions . . . . must be construed as applying only to such properties as have in fact been devoted

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[1] Every state in the union except Delaware now has a public utilities law of some kind. See note in 9 Illinois Law Review, 656, where all states are mentioned except Delaware, Utah and Wyoming. Wyoming enacted such a law in 1915, however, and Utah followed in 1917.

[2] Art. XII, § 23. ". . . . every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation."

[3] In practically all cases cited in these notes strong reliance was placed by the business concerned on the fifth or the fourteenth amendment.

[4] Cal. Stats. 1913, Ch. 84, p. 80, § 1. "Whenever any person, firm or private corporation . . . . owning, controlling, operating or managing any water system within this state, sells, leases, rents or delivers water to any person, firm, private corporation, municipality or any other political subdivision of the state whatsoever, except as limited by section 2 hereof, whether under contract or otherwise, such person, firm or private corporation is a public utility . . . ."

In the Public Utilities Act the term "water corporation" is defined as including "every corporation or person . . . . owning, controlling, operating or managing any water system for compensation within this state." Cal. Stats. 1915, Ch. 91, p. 118, § 1, subd. X.

[5] (Oct. 1, 1917), 56 Cal. Dec. 326.